No. 86-381

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SAN BERNARDINO,
Respondent,

RICHARD SMOLIN and GERARD SMOLIN,
Real Parties in Interest.

Brief of Real Parties in Interest

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QUESTION PRESENTED

Should this Court overturn a judgment barring the extradition of a party who, as a matter of law, cannot be validly charged with the offense for which his extradition is sought?

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BRIEF OF REAL PARTIES IN INTEREST

STATEMENT OF THE CASE

Richard and Judith Smolin were divorced in 1978 by the San Bernardino Superior Court in California. Judith was given custody of their two children, with reasonable

visitation rights granted to Richard, who has remained a California resident since that time. As part of the dissolution agreement Judith agreed not to take the children from California without the consent of Richard.[1]

After remarrying, Judith violated the dissolution agreement by removing the children to Oregon without notice to Richard. During the next two years she moved the children from Oregon to Texas, then from Texas to Louisiana, each time concealing their location from Richard for varying

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1/See Joint Appendix (Jt. App.) at 62. The Joint Appendix, at pages 60-98, contains the opinion of the California Court of Appeal, Fourth Appellate District, Second Division, issued on February 25, 1986 in In Re the Marriage of Smolin, E001146. This opinion was cited in the opinion of the California Supreme Court, reported at 41 Cal.3d 758, 716 P.2d 991 (1986), which appears in Appendix A to the Petition for Certiorari (Pet. App. A).

periods of time, thereby frustrating his visitation rights.[2]

In 1980, Richard moved for and obtained a joint custody order from the San Bernardino Superior Court,[3] the only judicial forum empowered to modify the 1978 custody decree (see Argument III, infra). When Judith refused to honor the specific visitation rights provided to Richard in that joint custody order, on February 27, 1981, Richard obtained from the same court an order granting him sole custody of his children (Pet App. A at 3; Jt. App. at 64-65). Judith was personally served in both of these

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2/See Jt. App. at 62.

3/This order was referred to by the California Court of Appeal, Fourth District, Second Division, in its decision of March 26, 1985, ordering the extradition of the Smolins, which is Appendix B to the Petition for Writ of Certiorari (Pet. App. B). See Pet. App. B at 3.

modification proceedings (Pet. App. A at 3-4; Pet. App. B at 3).

For almost two years after obtaining sole custody of his children, Richard was unable to locate them: Judith had moved them from Texas to Louisiana without informing Richard of their whereabouts (Jt. App. at 62-66). After Richard learned their location and began to write and call them, Judith and her new husband, James Pope, filed a Louisiana adoption action aimed at severing Richard's parental rights (Jt. App. at 66). That action later was found by a judge to verge "on the fraudulent"; a fair characterization, as Judith represented in the adoption proceeding that Richard had no interest in supporting and establishing communications with his children, and "yet the history of this case shows that interest was always there." (Jt. App. at 51-52.)

On March 9, 1984, confronted with the possibility that his relationship with the children he loved might be declared a legal nullity, and "armed with the latest California custody order, Richard and his father, Gerard [hereafter "the Smolins"], 'picked up' the children at a school bus stop in Louisiana and brought them back to California" (Pet. App. B at 4).

On April 11, 1984, Judith submitted to the jurisdiction of the San Bernardino Superior Court, and filed a motion to modify the court's 1981 order granting Richard sole custody of Jennifer and Jamie Smolin (Pet. App. A at 7; Jt. App. at 69-70). Despite this recognition of the existence of the California order granting full custody of the children to Richard, on April 30, 1984, Judith swore under penalty of perjury before a judge in Louisiana that on March 9, 1984

"Richard Smolin and Gerard Smolin [had been] without authority to remove children from affiant's custody" (Pet. App. B at 6). That affidavit, which accompanied and served as the basis for Governor Edwards' demand for the Smolins' extradition, never mentioned the California decrees under which Judith received custody of Jennifer and Jamie in 1978, nor the 1980 and 1981 modification orders granting Richard joint, and then sole, custody of his children (id.).

On May 31, 1984, the San Bernardino Superior Court denied Judith's motion to modify custody and reaffirmed its 1981 order granting Richard sole custody of his

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children.[4] Two weeks later, Governor Edwards executed his requisition demand for the arrest and extradition of the Smolins based on the aforementioned affidavit of Judith which falsely claimed Richard had no authority to take custody of his children (Pet. App. B at 5-6). On August 23, 1984,

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4/It was this order, as well as the file on which it was based, which the same court judicially noticed on August 24, 1984, in granting the Smolins a writ of habeas corpus barring their extradition to Louisiana (Jt. App. at 47-52). Judith's appeal of this reaffirmation of the 1981 custody order produced the appellate decision contained in the Joint Appendix at 60-98. On appeal, Judith argued: a) that the 1981 sole custody order was invalid at the time it was issued; and b) that the Superior Court should not have reaffirmed that order in May of 1984. The Court of Appeal explicitly found that the 1981 sole custody order was valid (Jt. App. at 70-84), a fact omitted from the state's brief. It then proceeded to consider "the order of May 31, 1984, 'reaffirming' the sole custody in Richard which was granted under the order of February 27, 1981" (id. at 84). It reversed and remanded that order, directing the trial court to consider whether a joint custody order would be more appropriate (id. at 97-98).

Governor Deukmejian of California issued extradition warrants against the Smolins (Pet. App. B at 6).

On August 24, 1984, the San Bernardino Superior Court issued a writ of habeas corpus barring the extradition of the Smolins (Jt. App. at 47-52). That order was overturned reluctantly by the California Court of Appeal. Although believing itself powerless to do other than surrender the Smolins to Louisiana, the majority commented:

> We remain curious as to why Governor Deukmejian's office has apparently declined to inform the Louisiana authorities about the latest California award of custody in a proceeding in which Judy personally participated. If there has been such transmission of information, our perplexity yet remains over what good purpose would be served in pursuing this matter as a criminal case. Certainly real parties acted rashly, but to put them through a criminal trial when, on all the facts, it seems apparent that no crime has been committed suggests to us a perversion of the federal system.

(Pet. App. B at 18, emphasis in original.)

On May 1, 1986, the California Supreme Court overturned the Court of Appeal decision and barred the extradition of the Smolins. The Court recognized that it could not make a general inquiry into the Smolins' guilt or innocence (Pet. App. A at 18). The Court quite sensibly noted, however, that the obvious innocence of the Smolins should not serve to defeat an otherwise well-founded challenge to their extradition (id. at 19). Taking judicial notice of the California decisions in the Smolin custody matter, the Court found the Smolins were charged in the extradition papers with kidnapping children of whom Richard was legal custodian. Since those allegations do not state a crime under

Louisiana law, the Court concluded the Smolins were not substantially charged and could not be extradited.

SUMMARY OF ARGUMENT

Petitioner, the People of the State of California (hereafter "state"), seeks from this Court an order that Richard Smolin and his father Gerard be extradited from California to Louisiana to face charges of kidnapping. The conduct charged in the extradition papers is not in dispute: on March 9, 1984, the Smolins picked up Richard's children, Jennifer and Jamie, at a bus stop in St. Tammany Parish, Louisiana, and returned them to California. That act did not constitute a crime under Louisiana law because Richard had sole custody of his children at the time. It was for that reason that in 1986 the California Supreme Court

barred the Smolins' extradition in the decision now challenged by the state.

The issue of the legality of the Smolins' conduct in Louisiana is one of law. The facts that the Smolins took custody of the children in March of 1984 and that Richard at that time possessed a 1981 California order granting him sole legal and physical custody of his children are not now, nor could they ever be, reasonably in dispute. The three questions critical to the disposition of the kidnapping charges against the Smolins can and must be answered solely by reference to one corpus of law or another: (1) can the sole legal custodian of the children commit the crime of kidnapping them, as that crime is defined by relevant Louisiana statutes; (2) was Richard Smolin's custody decree valid under California statutory and decisional law; and, (3) if the

decree was valid, does the Parental Kidnapping Prevention Act of 1980 (28 U.S.C. §1738A) require Louisiana to recognize it?

Although the law of extradition concededly reserves the resolution of nearly all disputed issues in a criminal proceeding to the courts of the demanding state, the legal question of whether charged conduct constitutes a crime in the state seeking extradition has long been deemed one that can be decided in the asylum state. The unique interplay of state and federal law in the present matter rendered it not only permissible but highly desirable that the question of the legality of the Smolins' actions in Louisiana be confronted in California, for it was only in California that the validity of Richard's custody decree, the key to the case, could be meaningfully reviewed. Furthermore, without

doing violence to well-established principles of extradition law, the decision of the California Supreme Court barring the Smolins' extradition protected the integrity of that state's judicial processes, since extradition would have required reliance on an affidavit of Richard's ex-wife containing demonstrably false statements. Finally, affirmance of the decision below would be both legally correct and eminently just, avoiding an extradition described by one lower court as abhorrent and "a perversion of the federal system" (Pet. App. B at 16, 18).

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ARGUMENT

I

THE SMOLINS WERE ENTITLED TO CHALLENGE THEIR EXTRADITION IN THE COURTS OF CALIFORNIA ON THE GROUND THAT THEIR ALLEGED CONDUCT IN LOUISIANA DID NOT CONSTITUTE A CRIME UNDER THE LAWS OF THAT STATE BECAUSE RICHARD SMOLIN WAS THE SOLE LEGAL CUSTODIAN OF HIS CHILDREN IN MARCH OF 1984

All parties to this action agree that an individual is entitled to judicially challenge his impending extradition on the ground the extradition documents themselves establish, as a matter of law, that he cannot be validly charged and convicted of the crime of which he is accused in the demanding state. See Brief for Petitioner (Pet. Brief) at 28, citing Roberts v. Reilly, 116 U.S. 80, 95 (1885) (issue of substantial charge under laws of demanding state "is a question of law and is always open upon the face of the

papers to judicial inquiry on an application for a discharge under a writ of habeas corpus").[5] See also Michigan v. Doran, 439 U.S. 282, 288-89 (1978) (On habeas corpus, court in asylum state may consider "whether the petitioner has been charged with a crime in the demanding state. . . .").

Thus the state has no quarrel with the holdings of two cases relied on by the California Supreme Court in barring the Smolins' extradition (Pet. Brief at 36-38). In People ex rel. Lewis v. Commissioner of Correction, 100 Misc. 2d 48, 417 N.Y.S.2d 377 (1979), aff'd, 75 App.Div. 526, 426 N.Y.S.2d

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5/The Uniform Criminal Extradition Act, to which both California and Louisiana subscribe, also requires that an extradition demand be accompanied by documents which substantially charge a crime under the law of the demanding state. (Pet. App. A at 14-15.)

969 (1980),[6] Alabama sought the extradition of the petitioner from New York, alleging certain conduct as the basis for a charge of violating Alabama's securities fraud law. The petitioner contended his alleged conduct did not constitute an offense in Alabama; New York authorities replied that such an inquiry was foreclosed in the asylum state. Lewis held that the courts of New York had the power and obligation to inquire whether the petitioner's alleged behavior violated Alabama's criminal statutes, placing on the alleged fugitive the burden of conclusively establishing that "statutes or decisional law of the demanding state do not establish the act as criminal." 417 N.Y.S.2d at 345.

6/Lewis and Application of Varona, infra, were cited by the California Supreme Court in its opinion below (see Pet. App. A at 20-21).

In Application of Varona, 38 Wash.2d 833, 232 P.2d 923 (1951), California had charged the petitioner with theft from a business entity in which he was a partner. Taking into consideration California caselaw from which "[i]t appears to be the settled law of the state of California that a partner cannot be found guilty of theft of the funds of the partnership of which he is a member", the Washington Supreme Court held that the petitioner was not substantially charged with a crime in the extradition papers and denied extradition.[7] Id. at 24.

The state thus agrees that extradition may be successfully challenged in the courts of the asylum state when the requisition documents themselves allege or reveal facts

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7/The Varona type of analysis has been employed in extradition cases for over a hundred years. See Scott, The Law of Interstate Rendition (Extradition) (1917), at 235-50.

which establish that the alleged fugitive has committed no crime under the decisional and statutory law of the demanding state. There is and can be also no dispute between the parties that the crime of which the Smolins are charged in Louisiana -- the kidnapping of Richard's children -- cannot be committed by a parent "to whom custody has been awarded by any court of competent jurisdiction of any state," since the crime is defined as the taking of children from their legal custodian. See Louisiana Revised Statutes (hereafter R.S.A.) §14.45(4).[8]

8/Louisiana decisional law also unquestionably establishes that if Richard Smolin could not kidnap his children due to his status as their legal custodian, his father did nothing illegal in assisting Richard in taking custody of the children. State v. Elliot, 171 L.A. 306, 311, 131 So. 28, 30 (1930) ("Where a father is entitled to the possession of his minor child against all the world except its mother, and where the father (footnote cont.)

The parties also apparently agree that had the Louisiana extradition papers mentioned the California custody decrees of 1978, 1980, and 1981, the California courts could have considered those decrees in determining, as a matter of law "upon the face of the papers," whether the Smolins were substantially charged with a crime in the demanding state. Those decrees, of course, were the heart of the Smolins' claim against their extradition. If they were properly before the California courts, then those courts were constitutionally free to consider the entirety of the Smolins' arugment that they were not "substantially charged" with a crime in Louisiana, and to bar extradition if

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8. (Cont.)

and mother are equally entitled to its possession, he does not commit the crime of kidnapping by taking possession of it . . . Nor is a person who assists the father under such circumstances guilty of the crime....").

under California law the decrees established Richard's status as sole custodian of his children in March of 1984.

The papers, however, did not mention either the 1978 California decree or the 1980 and 1981 modifications of it. Instead, they contained Judith's sworn statement, dated April 30, 1984, that Richard had had no authority to take custody of the children in Louisiana; a statement Judith clearly knew was false at the time she made it.

We therefore turn to the principal issue in this case: whether Richard Smolin's 1981 California order granting him sole custody of his children was properly considered by the California courts through the device of judicial notice. Once they demonstrate that consideration of the decree was proper, the Smolins can readily establish that they were

not substantially charged with an offense in Louisiana.

II

THE CALIFORNIA COURTS ACTED CORRECTLY IN TAKING JUDICIAL NOTICE OF THEIR OWN ORDERS IN DECIDING WHETHER THE SMOLINS WERE SUBSTANTIALLY CHARGED UNDER THE LAWS OF LOUISIANA

As noted above, the state does not challenge the right of the California courts to "entertain the issue of whether the person [whose extradition is being sought] is 'charged' with a crime. . . ." (Pet. Brief at 20). Rather, its sole objection to the decision below is that in "entertaining" that issue the California courts took "judicial notice of evidence extrinsic to the extradition documents, albeit evidence within [their] own files. . . ." (id. at 22). According to the state, "the inquiry on this issue may not go beyond the face of the

extradition documents" (id. at 28-29, footnote omitted).

The state is forced to admit, however, that the determination of whether an alleged fugitive has been substantially charged always roams beyond the extradition documents, in that such an inquiry necessarily requires information not found in those documents: the law of the demanding state. The state thus concedes that a court in an asylum state is empowered to utilize the device of judicial notice in deciding whether conduct alleged in extradition papers constitutes a crime in the demanding state.

> That a court may judicially notice the law of the demanding state in determining if the fugitive is substantially charged is not disputed.

(Pet. Brief at 36-37, emphasis in original.)

Having conceded that it is proper for an asylum state to take judicial notice of the

"law" of the demanding state, it appears that the state would agree that if a Louisiana domestic relations decision established that Richard Smolin was the legal custodian of his children on March 9, 1984, the California courts could have taken judicial notice of that order, and determined that the Smolins were not and could not be substantially charged with kidnapping them. The question on which the parties to this action part ways is whether California's courts must ignore their own lawful orders in addressing the same issue.

The gist of the state's argument appears to be that in noticing statutes or judicial decisions of the demanding state, the courts of an asylum state are properly confining themselves to questions of law (Pet. Brief at 36-37); but that taking judicial notice of legal judgments of the asylum state

constitutes an inappropriate consideration of "extrinsic evidence" of a fact (id. at 37-38).

In Lewis and Varona, which the state cites with approval, the courts of asylum states took judicial notice of the existence, as well as the content, of certain statutes and judicial decisions of the demanding state.[9] There is no functional difference

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9/To cite another example, in Contreras v. State, 587 S.W.2d 723 (Tex. Crim. App. 1979), Texas prohibited the extradition of an alleged fugitive to Mississippi because the supreme court of Mississippi had recently declared unconstitutional the statute under which the fugitive was charged. In so doing, Texas took judicial notice of a fact -- that the relevant decision had been rendered -- as well as of the law the Mississippi supreme court's opinion contained.

between the noticing by an asylum state of the law of a demanding state and its taking judicial notice of its own decisional law and statutes. If the first type of notice involves only issues of law, as the state contends, so does the second.

The use of judicial notice by the California courts in this matter was fully consistent with this Court's decision in Michigan v. Doran. Doran recognized that a court of an asylum state hearing a challenge to an extradition order may consider "whether the petitioner has been charged with a crime in the demanding state" (439 U.S. at 288-89), because the resolution of this issue turns on "historic facts readily verifiable". Id. The taking of judicial notice fits neatly within the Doran framework as this evidentiary device is applied to factual matters "(1) generally known within the

territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Federal Rules of Evidence, Rule 201(b).[10] If, as Doran clearly implies, an asylum state court can take notice of the law of a demanding state because the existence and content of that law is "readily verifiable," an asylum state court no doubt can take notice of its own legal judgments, which are all the more "readily verifiable."

Doran also deemed it appropriate that asylum states conduct factual inquiries on the issues of identity and fugitivity. 439 U.S. at 288-89. Adjudication of either of

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10/See also Cal. Evid. Code §452(h) (allowing notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy").

these issues requires the admission of evidence, at times voluminous, outside the extradition papers. See, e.g., In Re Rowe, 67 Ohio St.2d 115, 423 N.E.2d 167 (1981) (petitioner produced and examined fourteen witnesses in an attempt to establish nonfugitivity).[11] Yet, as was noted in Doran: "There is nothing to indicate that this type of routine and basic inquiry has led to frustration of the extradition process." Id. at 296-97 n.7 (Blackmun, J., concurring). The extremely narrow inquiry undertaken below by the California courts, limited to the face of the extradition

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11/Moreover, judicial notice has been utilized in extradition cases in which identity or non-fugitivity has been at issue. For example, in Hogan v. Buerger, 647 S.W.2d 211, 215 (Mo. App. 1983), the court took judicial notice of the distance between two states and the unavailability of airline flights in concluding that the petitioner had not been in the demanding state at the time of the alleged offense.

documents and the law and legal judgments of the demanding and asylum states, threatens far less disruption of the extradition process than the fact-intensive investigations of identity and fugitivity sanctioned by Doran.

The state also argues that, in holding the alleged conduct of the Smolins did not constitute a crime, the judgment below is nothing but a disguised "determination on the ultimate issue of real parties' guilt or innocence" (Pet. Brief at 49), in violation of the fundamental principle of extradition law "that the asylum state may not inquire into the guilt or innocence of the accused or consider any affirmative defense to the crime" (id. at 30).

Yet evidence of mistaken identity or non-fugitivity, while introduced to prove one fact, equally proves another: innocence of

the crime charged. See, e.g., Hyatt v. Corkran, 188 U.S. 691, 719 (1903) (petitioner, by proving he was not in demanding state at time of alleged crime, established he was not a fugitive subject to extradition). The fact that evidence admitted for a purpose proper under extradition law also tends to prove innocence does not prohibit its consideration.[12]

12/The California Supreme Court acknowledged that, as in the areas of identity and non-fugitivity, permissible inquiry into whether an alleged fugitive is "substantially charged" inevitably impinges on, but is not coextensive with, the issue of guilt or innocence:

> It would ordinarily follow from the fact that a crime was not substantially charged that the person against whom the attempted charge was made was not guilty of its commission. But the converse, of course, is not true: from the fact that a person may be found not guilty of a crime it does not follow

(footnote cont.)

Finally, the state asserts time and again that the decision of the California Supreme Court is unprecedented. It is not. In Ex Parte Efner, 322 S.W.2d 285 (Tex. Crim. App. 1959), a mother was charged with kidnapping a child over whom the asylum court had granted her custody prior to the date the crime was alleged to have occurred. Taking notice of the decree, the Texas court found the petitioner had not been charged with conduct constituting a crime in the demanding state and blocked her extradition. See also Ex Parte Kelsey, 19 N.J.Misc. 488, 21 A.2d 676 (N.J. Super. Ct. 1941); Hard v. Splain, 45 App. D.C. 1 (1916).

The parties agree that the issue of whether the Smolins were substantially

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12. (Cont.)

> that the crime itself was not substantially charged.

(Pet. App. A at 19 n.8.)

charged was one of law, and had to be disposed of without the introduction of external evidence relating to a factual defense. The issue of whether Richard was his children's legal custodian on March 9, 1984 was also one of law, however. The use of judicial notice to bring before a court deciding the issue of "substantial charging" legal orders relevant to that question was entirely within the limited scope of extradition proceedings.

III

WHEN READ IN LIGHT OF RELEVANT LOUISIANA AND CALIFORNIA LAW, THE EXTRADITION DOCUMENTS ESTABLISHED THAT THE SMOLINS COMMITTED NO CRIME IN LOUISIANA

Having taken notice of their own records and judicial orders concerning custody of the Smolin children, the California courts found that Richard Smolin was the sole legal custodian of his children in 1984 and thus

could not be charged under Louisiana law with kidnapping them. It is obvious that if Richard Smolin was the valid legal custodian of his children in 1984 he committed no crime in returning them to California. While challenging the right of the California courts to take notice of Richard's 1981 sole custody decree, the state has declined to challenge the ruling below that the 1981 decree established Richard's right to sole custody of his children.[13]

Nonetheless, on the basis of a discussion (Pet. Brief at 38-45)

13/"Petitioner is not now challenging the California custody order relied upon by real party Richard Smolin. Indeed, petitioner certainly recognizes California's interest in protecting and upholding its custody orders" (Pet. Brief at 44).

The dissenting opinion in the California Supreme Court also noted that on March 9, 1984 Richard had a valid sole custody order. (Pet. App. A, Lucas dissenting, at 11 n.4.)

characterized by a generous disregard for child custody law, the state suggests "that the matter of Richard's defense to the Louisiana charge is subject to dispute." (Pet. Brief at 44-45.) As can be readily demonstrated, under controlling state and federal law there can be no such dispute.

The records of the San Bernardino Superior Court which were judicially noticed in this matter establish that court issued the Smolins' original divorce decree in 1978. Under the Uniform Child Custody Jurisdiction Act (UCCJA),[14] to which both Louisiana[15] and California subscribe, California thus maintained exclusive continuing jurisdiction to modify the 1978 order.

14/See U.L.A., Master Edition, Volume 9.

15/See, e.g., Wachter v. Wachter, 439 So.2d 1260 (La. App. 5 Cir. 1983).

> "Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside."

Bodenheimer, "Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA," 14 Fam. L.Q. 203, 214-15 (1981) (hereafter "Bodenheimer"), cited with approval in Kumar v. Superior Court, 32 Cal.3d 689, 696 (1982).[16]

16/See also Jt. App. at 75-76. The state is thus, quite simply, dead wrong in asserting that under the UCCJA: "There is no doubt that concurrent jurisdiction can exist in more than one state at a given time to render orders regarding the custody of children." (Pet. Brief at 39.) As Professor Bodenheimer, reporter for the special comittee which drafted the UCCJA, has stated:

(footnote cont.)

Federal law is to the same effect. Under the terms of the Parental Kidnapping Prevention Act of 1980, the state that issues an original child custody decree retains exclusive jurisdiction to modify that decree as long as one of the parties to the decree continues to reside in the state. 28 U.S.C.

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17. (Cont.)

> [T]he continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's continuing jurisdiction . . . Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.

Id. (Emphasis in original.)

§1738A(d).[17] Thus, Richard's 1981 sole custody order is binding on, and must be judicially noticed by, all other states (see

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17/28 U.S.C. §1738A(d) provides:

> The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(Emphasis added.) Subsection (c)(1), to which section 1738A(d) makes reference, provides that, "[a] child custody determination made by a court of a State is consistent with the provisions of this section only if . . . such court has jurisdiction under the law of such State...."

Pet. App. A at 31-33).[18] California, and California alone, had the power to modify the 1978 order giving Judith Smolin Pope sole custody of her children.[19]

Modifications occurred in 1980 and 1981, when Richard was given first joint, and then sole custody of his children by the San

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18/Even were this Court to hold that Louisiana rather than California must ultimately rule on the validity of the charges against the Smolins, this Court's opinion should provide guidance to the courts of Louisiana regarding the effect of 28 U.S.C. §1738A on the criminal charges lodged against the Smolins. To decline that opportunity now might mean that this Court would confront the same federal law question after this matter has wound its way through the entire Louisiana judicial system, a devastating prospect for the two innocent men now before this Court.

19/As the extradition papers alleged, Judith obtained a 1981 Texas sole custody decree, which merely gave full faith and credit to her 1978 California custody order. The Texas decree thus was founded on the original California order and, under both the UCCJA and PKPA, could and did not affect the exclusive right of Califiornia to modify the 1978 decree.

Bernardino Superior Court. As the California Supreme Court pointed out, the 1981 sole custody decree had not been challenged when Richard picked up his children in Louisiana in 1984 (Pet. App. A at 29). Judith later personally appeared and challenged the validity of both the 1981 decree, and a 1984 order reaffirming it, in the California Courts of Appeal. While, in this proceeding, Judith won the opportunity to seek modification of Richard's status as sole custodian of their children, her claim that the 1981 decree was jurisdictionally invalid was rejected (Jt. App. at 71-84). Judith did not exercise her right to appeal this ruling to either the California Supreme Court or to this Court. The matter is thus settled:

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Richard Smolin was his children's sole legal custodian in March of 1984.[20]

Since, to paraphrase the Louisiana

20/The state's treatment of the California appellate decision of February 25, 1986 in the Smolin civil case (Jt. App. at 60-98) is inexplicable. The state relies on language in the opinion to suggest that there may yet be grounds upon which to challenge Richard's 1981 sole custody decree (Pet. Brief at 38-44), yet never mentions that the very opinion it cites considered and rejected every argument raised against the decree's validity, thereby affirming that Richard was his children's sole legal custodian from February of 1981 through March of 1984 (Jt. App. at 70-84). The state's argument makes no more sense than would citation to this Court's decision in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), to demonstrate the continuing vitality of the argument of John W. Davis that "separate but equal" educational facilities are constitutional.

Furthermore, the factual basis for the state's suggestion that there might be a problem with Richard's 1981 decree -- that in moving in 1980 for modification of the 1978 decree Richard did not "advise the [San Bernardino Superior] court of [Judith's] pending proceedings in Texas" -- is incorrect. Richard's declaration in support of his motion for modification, which was filed on (footnote cont.)

kidnapping statute, the San Bernardino Superior Court is a "court of competent jurisdiction of any state," since California's courts have declared that Richard Smolin had been validly granted custody of his children from 1981 through 1984, and since federal law requires that the 1981 California decree be respected by

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20. (Cont.)

October 3, 1980, included the following statement:

> Respondent [Judy] has initiated proceedings in the District Court in Dallas County, Texas, to give full faith and credit to the modification of the Interlocutory Judgment dated August 6, 1979 in the Superior Court of the State of California for the County of San Bernardino.

(CT at 37.) The file of the child custody proceedings which contains this declaration was made part of the record of the present matter through the taking of judicial notice by the San Bernardino Superior Court (Jt. App. at 47).

Louisiana,[21] the judgment below that the extradition papers in this matter do not allege conduct by the Smolins constituting a crime in Louisiana was plainly correct.[22]

21/The operation of the federal statute provides another reason why the issue of the existence and validity of Richard's custody decree should have been open to litigation in California. Were the Smolins extradited, the Parental Kidnapping Prevention Act's "full faith and credit" clause would bar any collateral attack on Richard's 1981 decree in Louisiana. Under the federal statute, the only state that could entertain such an attack would be the state that issued the decree -- California. Had there been a defect in the decree, only a California court could have declared its existence. It therefore was in Louisiana's interest, as well as Richard Smolin's, to have the 1981 decree placed at issue in a California court.

22/Despite declining to challenge Richard's 1981 sole custody decree, the state chooses to cast gratuitous aspersions at both it and Richard himself. For example, it states that by "abducting and removing" Jennifer and Jamie from Louisiana, thereby "successfully transferr[ing] the forum for the custody dispute to California," the Smolins acted "contrary to the spirit and purpose

(footnote cont.)

IV

AS WITH ANY TYPE OF JUDICIAL ACTION, A COURT DECIDING AN EXTRADITION MATTER MUST BE EMPOWERED TO PREVENT FRAUD

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underlying both the PKPA and the UCCJA" (Pet. Brief at 48). That statement betrays a profound misunderstanding of the purpose and function of those two laws. They are designed to prevent a parent from taking children out of the state that issued an original custody decree in the hope of obtaining a more favorable decree elsewhere. Both laws achieve that objective by requiring all states to defer to the "exclusive continuing jurisdiction" of the state of the initial decree. See Bodenheimer, supra. In this case, it was Judith Smolin Pope who offended the "spirit and purpose" of the UCCJA and PKPA by taking the Smolin children from California in violation of the initial custody agreement (Pet. App. at 62), by filing custody actions in Texas and Louisiana, the latter an adoption action "verging on the fraudulent" (Jt. App. at 51), and by refusing to appear in California in the 1980 and 1981 modification proceedings, despite having been properly served.

The state also accuses the Smolins of "vigorously and consistently" refusing to do legal battle on any but their own turf -- i.e., California (Pet. Brief at 48). That broadside ignores the fact that both the UCCJA and PKPA mandate that any litigation over the custody of the Smolin children be conducted in California, the state of the initial custody decree.

By the time the San Bernardino Superior Court confronted the Smolins' petition to block their extradition in August of 1984, it knew the affidavit accompanying the requisition papers was, at best, grossly misleading and, at worst, perjurious. That affidavit by Judith Smolin Pope stated that Richard and Gerard, in March of 1984, were without legal authority to take custody of Jennifer and Jamie, yet months before Judith had recognized Richard's 1981 sole custody order by filing, and losing, a challenge to it in the very court confronted with her

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sworn statement that no such decree existed.[23]

To create an unlimited "fraud" exception to the ban in extradition proceedings on full fledged inquiries into guilt and innocence admittedly would be unwieldly: any defendant could delay extradition by demanding a full evidentiary hearing on his claim that the allegations against him were based on perjured testimony. The spectre of such procedural gamesmenship is in no way raised by the opinion below, however. If a defendant's claim of fraud requires the taking of testimony or the resolution of

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23/The state defends Judith's failure in her affidavit of April 30, 1984 to mention Richard's 1981 decree, of which she was concededly aware, on the ground that in 1980 Judith's Texas lawyer told her that any California order was unenforceable (Pet. Brief at 55). The mere suggestion by the state that a party may disregard a lawful court order whenever a lawyer advises her that she is free to do so is astounding.

evidence in conflict, he must be relegated to the remedies available in the courts of the demanding state. On the other hand, no court should be obligated to issue an order which its own records reveal would promote fraud.[24] That is the extraordinary situation in which the San Bernardino Superior Court found itself. The California courts acted correctly in refusing

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24/The application of generally sound procedural rules is suspended where, as in the present case, their use would perpetuate an act of fraud. To cite an example arising out of a federal context parallel to that of extradition, that of sister state judgments, the full faith and credit clause of the United States Constitution bars collateral attacks on the validity of the judgment of one state when a party seeks to give that judgment effect in the courts of another state. Durfee v. Duke, 375 U.S. 106, 111 (1963). That rule applies, however, only "in the absence of fraud" id. at 191 (emphasis added). See also Craig v. Superior Court, 45 Cal.App.3d 675, 680 (1975) (defendant allowed to attack foreign judgment on ground it is "affected with fraud").

extradition in this highly unusual set of circumstances.[25]

V

THE DECISION BELOW IS LIMITED TO ITS FACTS AND WILL HAVE NO APPRECIABLE IMPACT ON THE LAW OF EXTRADITION

The decision of the California Supreme Court does not broaden the permissible scope of extradition proceedings. Its significance lies only in the justice it so obviously worked in the unique circumstances of the Smolins' case.

The opinion below specifically holds that an extraditee may not challenge his extradition from the asylum state on the ground that he did not commit the act or

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25/It also may be argued that a demanding state's right under the federal constitution to the production by an asylum state of an alleged fugitive is weakened, if not nullified, by the reliance of its extradition demand on a demonstrably false affidavit.

possess the state of mind required to commit the charged offense (Pet. App. A at 19). It does not approve the introduction of any form of evidence other than that of court orders which can be judicially noticed, and are thus "historic facts readily verifiable." Michigan v. Doran, 439 U.S. at 289.

The state argues that the opinion below will enable those accused of stealing automobiles, rape, or bigamy to resist extradition by claiming they possess certificates of ownership or marriage licenses. (Pet. Brief at 53-54.) The analogy is false, since the simple existence of such certificates or licenses, which can be fraudulently obtained, cannot conclusively establish ownership or marital status. The true analogy would be to a party who fairly litigates his right to an automobile in state A. After losing his suit, he travels to

state B and swears out a false affidavit in support of extradition to the effect that his legal adversary, rather than gaining the car in question through a valid court order of state A, stole it from the declarant while in state B. It is only in such an extraordinary situation that the opinion below could be invoked, allowing the courts of state A to prevent a blatant fraud and miscarriage of justice by reference to their own, final order. This Court need have no quarrel with that result.

CONCLUSION

It is undisputed that in extradition proceedings an asylum state court may judicially notice the statutes and decisional law of the demanding state in order to determine whether an extraditee has been substantially charged with a crime. Logic and the efficient administration of justice

require that the asylum state should likewise be permitted to take judicial notice of its own laws when they are relevant to the determination of whether a crime has been substantially charged. Moreover, under the federal statutory framework that has been established to resolve disputes such as the one we have here, it is California law -- the very law of which judicial notice was taken in finding that a crime had not been substantially charged in this case -- that will ultimately be applied to resolve this matter.

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Real Parties in Interest urge this Court to affirm the California Supreme Court's opinion denying their extradition.

DATED: February 19, 1987

Respectfully submitted,

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